5-15-2018

Crawford v. Guthmiller Respondent's Brief Dckt. 45613

IN THE SUPREME COURT FOR THE STATE OF IDAHO

TODD CRAWFORD, individually; BENJAMIN CRAWFORD, individually; ETHAN CRAWFORD, individually, Plaintiffs/Appellants, v. DANIEL GUTHMILLER, individually; DENNIS GUTHMILLER, individually, Defendants/Respondents.	Supreme Court No. 45613 Ada County Case No.CV01-16-23543 **RESPONDENTS' BRIEF**

RESPONDENTS' BRIEF

Appeal of District Court of the Fourth Judicial District of the State of Idaho
In and For the County of Ada
Honorable Steven Hippler, District Judge Presiding

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I. STATEMENT OF THE CASE

A. Nature of Case

This is an appeal from a district court order dismissing all claims against Defendants/Respondents Dennis and Daniel Guthmiller ("Dennis" and "Daniel" respectively, collectively referred to as the "Guthmillers") in a personal injury action in which Plaintiffs/Appellants Todd, Benjamin, and Ethan Crawford (collectively the "Crawfords") failed to establish good cause for the failure to serve the Guthmillers within six months of filing the complaint under Idaho Rule of Civil Procedure 4(b)(2).

B. Course of Proceedings and Statement of Facts

Because the Crawfords' brief fails to cite the record relied upon in formulating their Statement of the Case, the Guthmillers provide this background, under Idaho Appellate Rule 35(b)(3), to clarify the course of proceedings at the trial court level. The Crawfords filed their Complaint and Demand for Jury Trial on December 29, 2016 ("Complaint"), alleging Defendant Dennis was negligent while driving Defendant Daniel's vehicle on January 2, 2015, which resulted in personal injuries to the Crawfords. (R. 6 – 9). On the final day of the six-month deadline to effect service, June 29, 2017, the Crawfords filed a motion seeking an extension of 90 days under Idaho Rule of Civil Procedure 4(a) [sic] to serve the Guthmillers by publication or personal service. (R. 10). In support of their motion, the Crawfords filed the Affidavits of Joy Garrison and Benjamin Storer, which purport to show the Guthmillers were avoiding service. (R. 10 – 14).

To support the assertion that the Guthmillers were avoiding service, Ms. Garrison's first Affidavit provides, "I personally tried to serve defendant on multiple occasions over the course of several months to no avail at 2484 N Hickory Way, Meridian, ID." (R. 12). On her final

attempt at service, on June 24, 2017, an inhabitant of the home informed Ms. Garrison that the Guthmillers had not lived there, "for almost two years." (R. 12). Ms. Garrison claimed, "Despites [sic] several searches with various sources, I have been unable to find any other address for defendant other than the address where I tried to serve the summons and complaint." (R. 12). Similarly, Benjamin Storer, who also attempted service on multiple occasions, concluded, "All of my searches show that Defendants still reside there and are avoiding service." (R. 14).

On July 12, 2017, the district court filed its Order Denying Motion for Order of Service by Publication and Extension of Time to Serve. (R. 15 – 16). The Honorable Steven Hippler determined the Crawfords failed to demonstrate good cause because: (1) the supporting affidavits did not specify when the attempts were made; (2) the supporting affidavits did not specify what efforts were actually taken to ascertain the correct address; and (3) the Crawfords failed to put forth sufficient reasons for waiting until the six month deadline to file a motion for extension of time. (R. 15 – 16). However, the district court allowed "Plaintiffs fourteen (14) days from the date of this Order to provide supplemental affidavits establishing good cause." (R. 16).

On July 24, 2017, the Crawfords filed their Amended Motion for Order for Service by Publication and Extension of Time Pursuant to I.R.C.P. 4(a) [sic]. (R. 18 – 19). Again, the Crawfords claimed the Guthmillers were avoiding service or had otherwise made themselves unavailable for service of process. (R. 18). In the Second Affidavit of Benjamin Storer, he identified the dates and times when he attempted personal service at the Hickory Way address – five times between February 7, 2017, and March 5, 2017. (R. 31). Similarly, in the Second Affidavit of Joy Garrison, Ms. Garrison identified the dates when she attempted service – six times between the dates April 13, 2017, and June 24, 2017. (R. 21). In the final five days before the service deadline, the Crawfords made zero attempts to serve the Guthmillers. (R. 21 and R.

31). Also, Ms. Garrison states she "did searches on several address search sites prior to giving the Summon [sic] and Complaint to the initial process server." (R. 21). The next time Ms. Garrison researched the Guthmillers' address was outside the six month period for service, on July 24, 2017, and on the same "address search sites" she initially used. (R. 21). Exhibits 1 through 4 to Ms. Garrison's Second Affidavit purport to show the the Guthmillers' address from the websites utilized by Ms. Garrison. (R. 21 – 29). The address search sites are publicwhitepages.com, familytreenow.com, and whitepages.com. (R. 21 – 29).

On July 31, 2017, the Guthmillers entered the case under a Notice of Special Appearance to seek dismissal for insufficient service of process. (R. 32 – 33). In Joy Garrison's Third Affidavit, attached as Exhibit 3 to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, Ms. Garrison sets forth facts that the Guthmillers' insurer, State Farm, knew of the filed Complaint. (R. 71 – 72). On September 8, 2017, the district court held a hearing into whether Plaintiffs made a sufficient showing of good cause. (Tr. Vol. I, p. 6, L. 1 – 6). At the close of the hearing, the court invited the parties to submit supplemental briefing to address whether due diligence requires the plaintiff to do something different when initial attempts to serve are consistently unsuccessful. (Tr. Vol. I, p. 16, L. 17 – 25). The parties both submitted their supplemental briefing, and on October 18, 2017, the district court filed its Memorandum Decision and Order on Motions to Dismiss and to Enlarge Time. (R. 91 – 97). Judge Hippler determined, under the totality of the circumstances, the Crawfords failed to show good cause and granted the Guthmillers' motion to dismiss. (R. 96).

A Judgment dismissing the Crawfords' claims without prejudice was entered on October 18, 2017. (R. 98). The Crawfords filed a timely Notice of Appeal in the district court on November 29, 2017. (R. 118).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. What is the proper standard of review for determining whether good cause exists for failure to timely serve?

B. Are Respondents Entitled to Costs and Attorney Fees on Appeal?

III. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 4(b)(2) provides the time limit required to serve a defendant after the complaint is filed. It provides:

> *Time Limit for Service.* If a defendant is not served within 6 months after the complaint is filed, the court, on motion or on its own after 14 days' notice to the plaintiff, must dismiss the action without prejudice against that defendant. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

I.R.C.P. 4(b)(2). This rule is substantively very similar to the rule set forth in Idaho Rule of Civil Procedure 4(a)(2) before July 2016. Therefore, the case law addressing the prior rule should be utilized to guide the Court in its interpretation and application of the current rule.

"Rule [4(b)(2)] is couched in mandatory language, requiring dismissal where a party does not comply, absent a showing of good cause." *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 347, 941 P.2d 314, 319 (1997) "[T]he determination of whether good cause exists is a factual one." *Id.* at 346, 941 P.2d at 318 (citing *Shaw v. Martin*, 20 Idaho 168, 174-75, 117 P. 853, 855 (1911)). Because the good cause determination is factual, and because the district court did not conduct an evidentiary hearing, this Court has held that the summary judgment standard is used in reviewing a trial court's decision that the plaintiff failed to establish good cause under I.R.C.P. 4(b)(2). *Id. See also Elliott v. Verska*, 152 Idaho 280, 288, 271 P.3d 678, 686 (2012).

> In an appeal from a grant of a motion to dismiss for untimely service of process, this court freely reviews the district court's rulings on questions of law. When reviewing a district court's determination of whether good cause existed to excuse the

> untimely service of process, this Court applies the summary judgment standard of review, unless the district court conducted an evidentiary hearing, in which case all reasonable inferences are drawn in favor of the district court's judgment.

Grazer v. Jones, 154 Idaho 58, 64, 294 P.3d 184, 190 (2013) (citations omitted). As such, the Court "must liberally construe the record in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Sammis*, 130 Idaho at 342, 941 P.2d at 318 (citations omitted). The burden to demonstrate good cause, however, lies with the party who failed to effect timely service. *Martin v. Hoblit*, 133 Idaho 372, 375, 987 P.2d 284, 287 (1999).

IV. ARGUMENT

A. The Crawfords Have Waived Their Remaining Issues by Failing to Comply with Idaho Appellate Rule 35(a)(6).

At the outset, the Crawfords' opening brief is devoid of citations to the record or parts of the transcript relied upon in their appeal. In determining whether to consider issues raised on appeal, this Court has held:

> We will not consider an issue not "supported by argument and authority in the opening brief." *Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008); *See also* Idaho App. R. 35(a)(6) ("The argument shall contain the contentions of the appellant with respect to issues presented on appeal, the reasons therefore, with citations to authorities, statutes and parts of the transcript and the record relied upon."). Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court. *Inama v. Boise County ex rel. Bd. Of Comm'rs*, 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing).
>
> Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. *Randall v. Ganz*, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975).

> A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 993 (1953). This Court will not search the record on appeal for error. *Suits v. Idaho Bd. Of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003). Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).

Bettweiser v. New York Irrigation Dist., 154 Idaho 317, 323, 297 P.3d 1134, 1140 (2013) (quoting *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010).

This issue is compounded when a summary judgment is at issue. "[T]he trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the court's attention." *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 582, 329 P.3d 356, 364 (2014) (quoting *Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008)). This rule has long been recognized by many courts. As the Ninth Circuit has stated on this subject,

> A lawyer drafting an opposition to a summary judgment motion may easily show a judge, in the opposition, the evidence that the lawyer wants the judge to read. It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence.

Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001). Just as a party has an obligation to point the Court to the actual location in the record where the questions of fact are established during summary judgment proceedings, a party has an obligation to cite to the appellate record to establish the basis for their argument. I.A.R. 35(a)(6). On an appeal of a summary judgment motion, the same obligation to show the Court where the issues of fact exist as it did in the underlying case.

Here, the Crawfords assert the district court erred in its determination that Plaintiffs did not show good cause for failing to serve Defendants within the mandatory six-month period, but do not cite the Court to anything in the record to support their appeal issues. For instance, Appellants argue the district court erred in relying on information provided by Defendants in support of their motion to dismiss. *Appellants' Brief*, dated April 9, 2018, pp. 9 – 10. However, Appellants do not direct the Court to where the lower court relied upon this information. In fact, there is nothing in the record to indicate the Crawfords raised that objection in the district court. *See Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746, 152 P.3d 614, 617 (2007) (The Idaho Supreme Court will not consider issues raised for the first time on appeal).

With respect to the remaining issues raised in Appellants' opening brief, they provide only a general attack on the district court's findings and leave this Court to search the record for any error. Accordingly, Appellants' argument is too indefinite to be heard and should be deemed waived.

B. The Standard of Review of Appeal Regarding Whether Good Cause Exists Should be Clarified.

As discussed above, Idaho case law states that appellate courts review whether good cause exists under I.R.C.P. 4(b)(2) utilizing a summary judgment standard. This, though, is not clear. The Idaho Supreme Court has stated that, "we must liberally construe the record in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997). While this is indeed a summary judgment standard, it is not the summary judgment standard that should apply to this case. As discussed above, the other option for the district court, besides a summary judgment motion, is to hold an evidentiary hearing. *See Elliott v. Verska*, 152 Idaho 280, 285,

271 P.3d 678, 683 (2012) (discussing the applicable standard if an evidentiary hearing is held on good cause). Under this procedure, the standard of review on appeal is whether the, "findings of fact are supported by substantial and competent evidence." *Id.*

To this end, the issue of whether good cause exists never goes to the jury. This is an issue that is decided only by the Court. As such, the summary judgment standard that should apply is not the summary judgment standard where a jury will be sitting as the trier of fact, but instead where the Court sits as the trier of fact. Under such circumstances, the trial court is not bound to give all reasonable inferences in the non-moving party's favor.

> This Court has held in the past that even though there are no genuine issues of material facts between the parties a motion for summary judgment must be denied if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable men might reach different conclusions. Such a rule is proper where the matter is to be tried to a jury, because even though evidentiary facts may be undisputed, those evidentiary facts may yield conflicting inferences as to what the ultimate facts of a case are. If such conflicting inferences are possible, then summary judgment would deprive the parties of the right to have the jury make the decision in the matter. Nevertheless, where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.

Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982) (citations and quotations omitted). "Drawing probable inferences under such circumstances is permissible since the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial." *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.*, 147 Idaho 117, 124, 206 P.3d 481, 488 (2009). In other words, where a trial judge will be sitting as the trier of fact, "the judge could draw those inferences which he deems most probable." *Argyle v. Slemaker*, 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct. App. 1984).

Under these circumstances, the trial court will be making the determinations of whether good cause exists. The jury, if one is requested, will never see this issue. Therefore, the statement of the standard of review in *Sammis* is not in line with Idaho law regarding summary judgment motions, and the Guthmillers ask the Court to recognize that Judge Hippler was allowed to make inferences, which he deems most probable because the factual background of this case is not significantly disputed. Instead, only the ramifications of the Crawfords' actions are disputed, i.e. whether the actions of their attorneys constitute good cause, because there are no, "Conflicting evidentiary facts [that] must still be viewed in favor of the nonmoving party." *Banner Life Ins. Co.*, 147 Idaho at 124, 206 P.3d at 488.

C. The District Court Did Not Err When it Determined the Crawfords Failed to Show Good Cause for Failing to Serve the Summons and Complaint upon Defendants Within Six Months of Filing the Complaint.

In the event this Court decides to hear and consider the Crawfords' assignments of error, their arguments should still fail because the district court did not err. There is no bright line test for determining good cause but, rather, the court must consider the totality of the circumstances. *Elliot v. Verska*, 152 Idaho 280, 290, 271 P.3d 678, 688 (2012). To show good cause under the totality of the circumstances, "such party must present sworn testimony by affidavit or otherwise setting forth facts that show good cause for failing to serve the summons and complaint timely." *Taylor v. Chamberlain*, 154 Idaho 695, 698, 302 P.3d 35, 38 (2013). The sworn testimony must focus on the "diligent efforts" of the party and "circumstances beyond the plaintiff's control." *Elliot*, 152 Idaho at 280, 271 P.3d at 688. Diligent efforts generally include efforts to (1) "locate the [defendants]," and (2) "to ascertain how . . . [to] serve them. *Sammis*, 130 Idaho at 347, 941 P.3d at 319. Interpreting a substantially similar service rule, federal courts caution, "The lesson

to the federal plaintiff's lawyer is not to take any chances. Treat the 120 days[1] with the respect reserved for a time bomb." *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1306-07 (3rd Cir. 1995) (quoting *Braxton v. United States*, 817 F.2d 238, 241 (3rd Cir. 1987)).

The Crawfords rely on *Martin v. Hoblit*, 133 Idaho 372, 987 P.2d 284 (1999), for the proposition that, because they did not wait until a week before the six-month deadline to begin efforts to serve, then their efforts in this case were diligent. In *Martin*, the plaintiff waited until eleven days before the service deadline to deliver the complaint to the sheriff for personal service. *Id.* at 377, 987 P.2d at 289. However, by the time the sheriff attempted service, it was discovered the defendant had moved out of the state so the plaintiff was unable to serve the complaint and summons within the six-month mandatory deadline. *Id.* The Court, after holding settlement negotiations are irrelevant to a good cause determination, reasoned that, under the totality of the circumstances, the plaintiff could not reasonably be viewed as diligent in "counsel's single timely act of forwarding the summons and complaint to the sheriff . . . ." *Id.* at 377, 987 P.2d at 289. To this end, *Martin* holds that courts may consider, as part of the totality of the circumstances, how long the plaintiff waited before attempting service. *See also Rudd v. Merrit*, 138 Idaho 526, 532, 66 P.3d 230, 236 (2003) ("Waiting five and three-fourths months before attempting to effect service does not show due diligence."). Delay in attempted service, however, is merely one consideration for a due diligence determination.

A diligent search should not be measured by the quantity of the search, but the quality. A review of other states' due diligence boundaries helps establish whether the Crawfords exercised due diligence in trying to locate Defendants' whereabouts. *See Sammis, supra*, 130 Idaho 342,

[1] The time limit set for service under former versions of Federal Rule of Civil Procedure 4(m), which in its current form, has a time limit of 90 days.

941 P.2d 314 (relying on federal case law to interpret previous I.R.C.P. 4(a)(2)); *Hammer v. Ribi*, 162 Idaho 570, 401 P.3d 148, 153 (2017) ("We prefer to interpret the Idaho Rules of Civil Procedure in conformance with interpretations of the same language in the federal rules."). In *Abreu v. Gilmer*, the Nevada Supreme Court said:

> [T]here is no objective, formulaic standard for determining what is, or is not, due diligence. The due diligence requirement is not quantifiable by reference to the number of service attempts or inquires into public records. Instead, due diligence is measured by the qualitative efforts of a specific plaintiff seeking to locate and serve a specific defendant.

Abreu v. Gilmer, 115 Nev. 308, 985 P.2d 746, 749 (1999) (Nev.R.Civ.P. 4(i) permits 120 days for service of summons and complaint). In determining the outer limits of due diligence, the Washington Court of Appeals held "that a plaintiff need not exhaust all conceivable means of personal service before service by publication is authorized. A plaintiff need only follow up on that information possessed by plaintiff which might reasonably assist in determining defendant's whereabouts." *Carson v. Northstar Development Co.*, 62 Wash. App. 310, 814 P.2d 217, 221 (1991) (citations omitted). This requires that reasonably available information be followed up on. *See Petru Kott v. Superior Court*, 45 Cal.App.4th 1126, 52 Cal.Rptr.2d 215, 221 (Cal. 1996) ("[L]ikely sources of information . . . must be searched before resorting to service by publication."); *Petrucelli*, 46 F.3d at 1307 ("A prudent attorney exercising reasonable care and diligence would have inquired into the matter further when it was obvious that the acknowledgment form was not forthcoming.") (Interpreting Fed.R.Civ.P. 4(m) – 120 days after filing of the complaint); *Southeast & Assocs., Inc. v. Fox Run Homeowners Ass'n, Inc.*, 704 So.2d 694, 696 (Fla. Dist. Ct. App. 1997) ("The plaintiff has the burden of showing that it reasonably employed the knowledge at its command, made diligent inquiry, and exerted an

honest and conscientious effort appropriate to the circumstances to acquire the information necessary to serve the defendant personally.").

In this case, the trial court correctly viewed the diligence issues as, not one of delay in attempted service, but whether a diligent attorney can continue to rely on outdated public address websites after multiple attempts at service at a single address have failed. In making its determination, the district court properly made its decision based on the facts as presented in the the Crawfords' affidavits. (R. 91 – 96). From those affidavits, the Crawfords' efforts to locate the Guthmillers fell well below what is generally required to constitute due diligence. *See Sammis*, 130 Idaho at 347, 941 P.3d at 319. The Crawfords' location efforts consisted of address searches on unreliable sources, such as publicwhitepages.com, familytreenow.com, and whitepages.com. It is undisputed these searches only took place once within the six-month service period – before giving the Summons and Complaint to the initial process server, Benjamin Storer. (R. 21 – 29). The next time the Crawfords searched for Guthmillers' location was after the six-month period to serve. (R. 21). It is further undisputed that the Crawfords attempted service only at the Hickory Way address. The record is empty as to any attempts to re-check whether the Crawfords had the correct address, despite multiple failed service attempts and an obvious lead from a resident of the home informing Ms. Garrison the the Guthmillers had not resided there for nearly two years.

The fact the Crawfords attempted service 11 times at a single address is not determinative of whether they were diligent. Rather, viewing the totality of the circumstances, the Crawfords' attempts to locate and serve the Guthmillers were shallow. A diligent attorney, after multiple failed attempts at a single address, should take reasonable additional steps to locate or confirm the Guthmillers' whereabouts. This is particularly true when the statute of limitations had expired for two out of the three plaintiffs. *See Tuke v. United States*, 76 F.3d 155, 156 (7th Cir.

1996) ("An attorney who files suit when the statute of limitations is about to expire must take special care to achieve timely service of process, because a slip up is fatal.") (Interpreting Fed.R.Civ.P. 4(m)). Then, five days before the final day to serve, the Crawfords were informed that the Guthmillers did not in fact live at the Hickory Way address. Instead of following up on this obvious lead, it appears Plaintiffs ignored it and jumped to the conclusion, without any further research, that the Guthmillers were evading service. In fact, the final five days of the service period do not reflect any efforts whatsoever to effect service before the deadline. Instead, the Crawfords filed a motion to extend time on the final day. A motion that itself requires good cause cannot be the saving grace to establish good cause for failure to serve.

Accordingly, the district court did not err in determining that the Crawfords failed to show good cause for not effectuating service in the six-month service period. The Crawfords were not diligent when they remained content with the public address searches performed prior to the first attempt at service, despite many failed attempts and being told the Guthmillers did not reside at that address.

D. Respondents are Entitled to Costs and Attorney Fees on Appeal

Respondents request an award of costs and fees on appeal pursuant to Idaho Appellate Rules 40 and 41, and Idaho Code § 12-121. An award of attorney fees is appropriate if this Court finds that the appeal was pursued frivolously, unreasonably, or without foundation. *Kirkham v. Stoker*, 134 Idaho 541, 546, 6 P.3d 397, 402 (2000); *Pass v. Kenny*, 118 Idaho 445, 449, 797 P.2d 153, 157 (Ct. App. 1990).

In this case, Appellants generally challenge the trial court's findings without any support in the record. There is no basis, in law or fact, for this Court to conclude that the district court

improperly determined Plaintiffs failed to show good cause. Therefore, Respondents qualify to receive an award of attorney fees under section 12-121.

E. Appellants are Not Entitled to Attorney Fees on Appeal.

Appellants ask the Court to award them attorney fees on appeal. *Appellants' Brief*, dated April 9, 2018, pp. 12 – 13. First and foremost, Appellants cite the incorrect standard for attorney fees. The "justice so requires" standard set forth by the Court in *Hoffer v. Shappard*, 160 Idaho 868, 883, 380 P.3d 681, 696 (2016), never took effect on March 1, 2017, because:

> In the interim, the Idaho Legislature amended Idaho Code section 12-121 to mirror the language of the previous Idaho Rule of Civil Procedure 54(e)(1), with the express purpose of reinstating the law as it existed prior to *Hoffer*. 2017 Idaho Sess. L. ch. 47, §§ 1, 2, p. 75-76. Idaho Code section 12-121 now provides that: "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably, or without foundation." I.C. § 12-121.

Regan v. Owen, 2014 WL 3927024, at *8 (Idaho Sept. 8, 2017).

Nonetheless, Idaho Code section 12-121 only allows a "prevailing party" to obtain attorney fees. In determining who is the prevailing party for purposes of costs, the prevailing party analysis includes consideration of, "the final judgment or result of the action in relation to the relief sought by the respective parties." I.R.C.P. 54(d)(1)(B). Unlike Respondents where affirmance would result in a dismissal of the underlying action, the best case scenario for Appellants would result in a remand to the district court. Until that remand is resolved, it would be impossible to determine who the prevailing party on an overall basis was. In *Cox v. City of Sandpoint*, after a summary judgment order was vacated and the case was remanded, the Court of Appeals states,

> Both parties request an award of attorney fees on appeal. Cox is the prevailing party on appeal but it remains to be seen whether Cox is the prevailing party in the action, and, therefore, entitled to attorney fees under I.C. § 12-120(3) and I.A.R. 41. The district court, upon final resolution of the case, may consider fees incurred on appeal when it makes an award to the prevailing party.

Cox v. City of Sandpoint, 140 Idaho 127, 133, 90 P.3d 352, 358 (Ct. App. 2003). In this case, a similar result should occur. Because a prevailing party must be determined, and Appellants cannot be a prevailing party on an overall basis as required by Idaho Rule of Civil Procedure 54(d)(1)(B) until the case reaches a resolution, Appellants should not be awarded fees on appeal.

V. CONCLUSION

For the foregoing reasons, the Guthmillers respectfully request this Court affirm the district court's Decision and Order on Motions to Dismiss and To Enlarge Time, and the court's Judgment. The Guthmillers also respectfully request this Court award attorneys' fees incurred in responding to this appeal.

DATED this 15th day of May 2018.

GJORDING FOUSER, PLLC

By _____
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Taylor H. M. Fouser – Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May 2018, a true and correct copy of the foregoing was served on the following by the manner indicated:

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